Filed 11/14/03 P. v. Lopez CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO CARLOS LOPEZ,

Defendant and Appellant.

F040310

(Super. Ct. No. SC083248B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Jeffrey D. Firestone and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

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An information filed November 9, 2001, charged Mario Carlos Lopez (appellant) and two co-defendants, Louis Reyes (Reyes) and Marc Raymond Zuniga (Zuniga), with attempted murder in violation of Penal Code sections 664/187, subdivision (a).[1] It was also alleged that the offense was committed with premeditation (§ 664, subd. (a)) and that appellant inflicted great bodily injury (§ 12022.7). Appellant was also charged with assault with a deadly weapon, or with force likely to cause great bodily injury, by a life prisoner, with malice aforethought, in violation of section 4500, subdivision (a). A great bodily injury allegation was included (§ 12022.7). It was further alleged that appellant had two prior strike convictions pursuant to section 667, subdivisions (c) through (j), which were alleged under section 667, subdivision (a). Appellant pled not guilty and denied all allegations.

Jury trial began on February 20, 2002. On February 22, 2002, the jury returned a verdict of not guilty on the charge of attempted murder, but guilty on the charge of assault. At the request of the prosecutor, the great bodily injury allegation in the assault charge was dismissed. In a bifurcated court trial, appellant's prior conviction allegations were found true.

Appellant was sentenced to a term of 27 years to life, without possibility of parole, plus a consecutive term of ten years. The sentence was ordered consecutive to appellant's existing unfinished prison term.

FACTUAL HISTORY

Appellant is a state prison inmate serving a life sentence at the California Correctional Institution (CCI) in Tehachapi.

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[1]All further statutory references are to the Penal Code unless otherwise stated.

On October 7, 2001, appellant and ten other inmates were in the exercise yard. According to standard procedure, the yard and each inmate were searched prior to the inmates going into the yard and no weapons were found.

Correctional Officer Jose Galvan watched the exercise yard from an observation booth approximately 10 feet above the deck. At approximately 12:20 p.m., Galvan noticed a group of inmates gathered in the shadows along the western wall of the yard. Galvan saw Reyes punch Medina in the face. The force of the punch caused Medina's head to hit the wall behind him, and he fell to the ground. As he fell, appellant and Zuniga joined Reyes in assaulting Medina.

Galvan ordered the inmates to get down and all complied but appellant, Reyes, and Zuniga. In response, Galvan fired a rubber bullet into Zuniga's buttocks, and Zuniga retreated and complied with the yard-down order. Reyes got down a few seconds later. Galvan fired two shots at appellant, who continued to hit and kick Medina. Appellant was shot in the wrist. Only then did he retreat and comply with the order.

Galvan estimated that appellant delivered 5 to 10 blows with his fists and 5 kicks to Medina's face. Medina was transported to the hospital where he received 12 to 15 stitches for multiple facial lacerations.

After the yard was cleared, Galvan found near the location of the fight a fragment of sharp plastic that was spattered with blood. During the altercation, Galvan did not see any weapons.

DISCUSSION

I. Malice aforethought instruction

Appellant was charged with a violation of section 4500, which provides:

> "Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty

> shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years."

Appellant agrees the jury was properly instructed that, in order to convict appellant of violating section 4500, it was necessary to find "[t]he assault was committed with malice aforethought." However, appellant contends the court erred in giving CALJIC No. 1.22 as the applicable definition of malice.

CALJIC No. 1.22, as given, is patterned after section 7 and defines malice as "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act …." Appellant is correct in noting that malice and malice aforethought, as required in section 4500, are not synonymous. (*People v. Sekona* (1994) 27 Cal.App.4th 443, 453.) In *People v. St. Martin* (1970) 1 Cal.3d 524, 536-537, our Supreme Court held that the definition of malice contained in section 7 should not be given to the jury to define the element of malice aforethought applicable to section 4500.

While respondent agrees the incorrect instruction on malice was given, respondent first contends that appellant waived the error by failing to object. However, "an objection is not always required in order to preserve an issue of instructional error for appeal." (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074.) Pursuant to section 1259, if the substantial rights of the defendant are affected, an appellate court may review instructions given, refused, or modified even in the absence of an objection. (*People v. Kainzrants, supra,* at p. 1074.)

Respondent also points out that CALJIC No. 8.11, defining malice aforethought, was given, although in the context of instructions on attempted murder. CALJIC No. 7.35 was given, which instructed the jury that in order to find appellant guilty of violating section 4500, they had to find that the assault was committed with malice aforethought. However, this instruction was followed with a definition of malice similar

to CALJIC No. 1.22. "An instruction that omits a required definition of or misdescribes an element of an offense is harmless only if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Mayfield* (1997) 14 Cal.4th 668, 774, internal quotations omitted; see also *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1128.)

There are a number of cases in which both the "to vex" malice instruction and the CALJIC No. 8.11 and/or section 188 instruction were given in error. However, none involve section 4500 at issue here. Rather, these cases are in the context of murder convictions.

For instance, in *People v. Shade* (1986) 185 Cal.App.3d 711, the defendant was convicted of second degree murder. CALJIC No. 1.22 was given in error. The court in *Shade* found the error harmless because it also correctly instructed on malice aforethought as defined in section 188 and embodied in CALJIC No. 8.11. (*People v. Shade, supra,* 185 Cal.App.3d at p. 715.)

> "This is so because, in these circumstances, reversal is required only when the reviewing court cannot determine from the record on which theory the verdict rested. [Citation.] Here the record supports only the 'intent' theory of malice. Defendant, while asking the victim how it felt to be beat up, intentionally and repeatedly hit the victim about the head and shoulders with a shotgun, rendering the victim's face unrecognizable, while the victim lay helpless on the floor. This evidence clearly indicates defendant harbored a conscious disregard for life and supports the conviction based on the correct theory of malice." (*People v. Shade, supra,* 185 Cal.App.3d at p. 715.)

In *People v. Chavez* (1951) 37 Cal.2d 656, the defendant was convicted of first degree murder. Again, malice was incorrectly defined as both "to vex," etc., and also defined in the language of section 188. The evidence showed the defendant followed a woman home, entered her house, and physically held her down with a knife in his hand. The woman got away, but defendant pursued her and eventually stabbed her. (*People v. Chavez, supra,* 37 Cal.2d at pp. 659-660.) The court in *Chavez* found no prejudice

resulted because the jury was told the defendant must be acquitted unless the elements of the charged crime were found. (*Id.* at pp. 666-667, referring to *People v. Waysman* (1905) 1 Cal.App. 246, 248.)

Our Supreme Court in *People v. Chacon* (1968) 69 Cal.2d 765 held that "[t]he words malice aforethought in section 4500 have the same meaning as in sections 187 and 188. [Citations.] Thus the rules that have evolved regarding malice aforethought as an element in a charge of murder apply to section 4500." (*Id.* at p. 781.) As a result, drawing on the analogous case law above relating to the incorrect use CALJIC No. 1.22 in a prosecution for murder, the giving of this incorrect instruction appears harmless.

Consider the evidence, which was consistent with a theory of intent. Appellant's defense was that he assaulted the victim but that he did not commit attempted murder. Officer Galvan testified that prior to the attack, the victim was standing near a wall. Reyes delivered the first blow, which knocked Medina to the ground. Appellant and Zuniga then joined in the assault. Galvan estimated that appellant delivered 5 to 10 blows with his fists and 5 kicks to Medina's face, all while the victim was on the ground. The jury was also able to make their own determination from a viewing of the surveillance tape.

However, appellant's complaint is not only that the incorrect instruction was given, but also that the order in which the instructions were given was confusing and therefore prejudicial. The general rule is that the order in which instructions are given is immaterial. (*People v. Sanders* (1990) 51 Cal.3d 471, 519; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 942.) In fact, the jury was specifically instructed that "[t]he order in which the instructions are given has no significance as to their relative importance." The jury was instructed that an element of section 4500 was that the assault be committed with malice aforethought and that each of the elements of section 4500 must be proved. The jury was instructed that, in order to prove assault, the defendant must have "willfully" committed the act, "willfully" meaning that the person committing the act did

so intentionally. The jury was instructed that, as to attempted murder and assault by a prisoner, there "must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed." It was further instructed that the mental state required was included in the definition of the crimes. Finally, the jury was instructed to consider the instructions as a whole, pursuant to CALJIC No. 1.01. We thus conclude that the placement of the challenged instruction did not work to appellant's prejudice.

In all, we conclude the evidence supports the jury's finding of malice aforethought, and the giving of CALJIC No. 1.22 was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

II. Failure to instruct sua sponte on provocation and imperfect self-defense

Appellant contends the court erred in failing to instruct on provocation (heat of passion or sudden quarrel) and imperfect self-defense.

"It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) It is equally well settled that this sua sponte duty extends to defenses but "arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12, and overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 148, 164-178.)

Appellant relies on *People v. St. Martin, supra,* 1 Cal.3d 524 and *People v. Chacon, supra,* 69 Cal.2d 765. In *Chacon*, the defendant and two other inmates attacked another inmate with knives and stabbing tools. At trial, eight inmates testified that none of the correctional officers were present when the attack began and the defendants and

victim had long-standing animosity toward each other. Further, the victim had, prior to the attack, continually shouted threats and profanities at the defendants; the victim had trouble with the correctional officers; and just prior to the incident, the victim made a homosexual advance toward one of the defendants. He then drew a knife and stabbed two of the defendants. (*Id.* at p. 771.) The appellate court found a sua sponte duty to instruct on provocation, and the failure to do so was error because the jury could have found the original attack by the victim was sufficient to constitute provocation. (*Id.* at p. 781.)

In *People v. St. Martin, supra,* the defendant attacked a fellow inmate in his cell. A correctional officer responded to the sounds of scuffling and cries and found the defendant kneeling over the victim, and then observed the defendant plunge a knife into the victim. The defendant and another inmate both testified that prior to the attack, the victim made verbal threats and pulled a knife and attacked the defendant. (*People v. St. Martin, supra,* 1 Cal.3d at p. 529.) Another inmate testified that the victim had been trying to find someone to kill the defendant, but then said he had a knife and planned to do it himself. (*Id.* at p. 530.) Yet another inmate said the victim had a knife two or three days prior to the attack. (*Ibid.*) The court in *St. Martin* stated that the trial court was required sua sponte to instruct the jury with a provocation instruction when there is sufficient evidence "to inform the court that the defendant is relying upon provocation to show that he did not act with malice aforethought …." (*Id.* at p. 531.)

By contrast, in *People v. Hisquierdo* (1975) 45 Cal.App.3d 397, the defendant, a life inmate, stabbed the victim and claimed someone else did it. The defendant did not rely on provocation as a defense and requested no such instruction. (*Id.* at p. 408.) Two correctional officers testified they saw the defendant strike and stab the victim. (*Ibid.*) The court in *Hisquierdo* found no duty on the part of the trial court to instruct sua sponte on provocation, finding the defendant did not rely upon the defense of provocation, nor was it a principle of law closely connected with the facts. (*Ibid.*)

This case is more akin to *Hisquierdo* than it is to *Chacon* or *St. Martin*. Here, there was no evidence of provocation, nor did appellant rely on provocation as a defense. Officer Galvan testified that appellant joined the attack after Medina was knocked to the ground by Reyes. Although defense counsel admitted in closing argument that appellant assaulted Medina, he did not argue that appellant was provoked. Instead, he described prison life as a "very contentious situation, seven days a week, twenty-four hours a day, three hundred sixty-five days a year." Describing the assault as a "feeding frenzy," defense counsel argued the assault took place as "[o]ne act [that] takes place and pretty soon winds up bubbling over to much larger."

Neither is there any evidence to support the trial court's sua sponte duty to instruct on imperfect self-defense or imperfect defense of another. The doctrine of imperfect self-defense requires the defendant to have had an actual belief in the need for self-defense, which negates malice aforethought. Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—is not enough. The defendant's fear must be of imminent danger to life or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Sekona*, *supra*, 27 Cal.App.4th 443, 448-449.)

Here, there is no evidence to support the theory that appellant was reacting to an imminent threat, either to himself or anyone else. In fact, appellant joined in the attack only after Medina had been knocked to the ground and was not a threat. The evidence shows that once Medina was on the ground, appellant continued to hit and kick him and did not stop even though he was ordered to do so repeatedly by Officer Galvan.

No facts or theory presented warrant instructions on provocation or imperfect self-defense. As a result, the trial court had no sua sponte duty to so instruct.

III. The stipulation

Prior to trial, the prosecutor asked for a stipulation that appellant was serving a life term at the time the current crime was committed. Defense counsel for appellant agreed to the stipulation, and the court received a waiver from appellant. In part, the court stated

to appellant, "By doing that, the People will then not be bringing in your prior conviction, for whatever it was. The jury will know that you are in prison on a life term."

At trial, the prosecutor presented the stipulation to the jury as follows:

> "With respect to the defendant Lopez, it is stipulated by and between the prosecution and the defendant, and express consent of the accused, October the 7th of last year the defendant was serving a term of life without possibility of parole in California State Prison."

Appellant contends the prosecutor committed misconduct by telling the jury appellant was serving a life sentence without the possibility of parole. He argues that this mischaracterization revealed the aggravated nature of appellant's prior offenses because life without possibility of parole is reserved for grave crimes, like murder. Respondent correctly asserts that a defendant cannot complain of misconduct by a prosecutor unless a timely assignment of misconduct is made and a request is made that the jury be admonished to disregard the impropriety. (*People v. Clair* (1992) 2 Cal.4th 629, 662.) However, since appellant also contends counsel was ineffective for failing to object, and that the issue is reviewable as instructional error, we address whether any prejudice occurred as a result of the alleged misconduct. Prosecutorial misconduct will lead to reversal only when it is "'reasonably probable that a result more favorable to the defendant would have occurred'" in the absence of the improper conduct. (*People v. Haskett* (1982) 30 Cal.3d 841, 866; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Again, appellant's reliance on *People v. Chacon, supra,* 69 Cal.2d 765, is unavailing. In *Chacon*, the defendants claimed the prosecutor committed misconduct by emphasizing their prior felony convictions at the outset of the trial. A records officer at the prison was the first witness for the prosecution and testified that each of the four defendants was serving a life term at the time of the incident. The witness listed all the convictions for which each was serving time, a total of nine violent or dangerous felonies. Defense counsel did not object to this testimony. (*Id.* at p. 777.) Although defense counsel had been willing to stipulate that the defendants were serving life terms, the

prosecutor would agree to the stipulation only if the commitment records were admitted for his use in argument. (*Id.* at p. 778.) The court in *Chacon* stated, "The prosecution could have established the fact that the defendants are life termers in a less prejudicial way than that undertaken here." (*Ibid.*)

Clearly the prosecuting attorney misspoke when stating the stipulation. There was no reason for appellant to enter into the stipulation except to prevent the jury from being told about the exact nature of appellant's prior convictions. In fact, the jury was instructed with CALJIC No. 7.35, which listed the elements of a violation of section 4500 and included the agreed-upon stipulation. In addition, no evidence was introduced detailing the nature of appellant's prior convictions.

Although not an ideal situation, we do not believe it is reasonably probable that a result more favorable to appellant would have occurred had the jury been told appellant was serving a life sentence, rather than a life sentence without the possibility of parole. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

IV. CALJIC No. 17.41.1

Appellant contends that CALJIC No. 17.41.1 violates the Constitution. He acknowledges that the issue has been resolved against him by our Supreme Court in *People v. Engelman* (2002) 28 Cal.4th 436, 439-440, which held the instruction "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict." Appellant presses his claim to preserve the issue for the federal forum. We acknowledge appellant's argument and find it lacks merit.

V. The section 667, subdivision (a), enhancements

Section 667, subdivision (a)(1), provides a five-year sentence enhancement for each prior conviction of a serious felony on charges "brought and tried separately." Our Supreme Court has held this language "demands that the underlying proceedings must

have been formally distinct, from filing to adjudication of guilt." (*In re Harris* (1989) 49 Cal.3d 131, 136.) Thus, in *Harris*, the trial court erred in imposing two enhancement terms for two convictions arising out of a single complaint filed in municipal court, even though they were prosecuted under separate informations in superior court. (*Id.* at p. 137.)

The record reveals that appellant's two prior convictions arose from charges filed in a single complaint and prosecuted under one information (Los Angeles County, Case No. BA134725). In accord with *Harris*, these two convictions were not based on charges brought and tried separately. Consequently, the court erred in imposing more than a single five-year enhancement and one must be stricken.

VI. Dual use of prior convictions for sentence enhancement

Appellant argues that since a prior conviction for a life imprisonment offense is an element of his current offense, it cannot be used to enhance his sentence under a recidivist statute. He contends it is legally impossible to violate section 4500 without having a prior serious felony conviction. Thus, the court erred in imposing a five-year enhancement pursuant to section 667, subdivision (a), and using the prior life-sentence conviction as a strike under the "Three Strikes" law.

A. Imposition of section 667, subdivision (a)(1), enhancement

Appellant first argues that the court improperly relied on his prior conviction to impose a section 667, subdivision (a)(1), enhancement. Section 667, subdivision (a)(1), provides:

> "[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately.…"

Appellant relies on *People v. Edwards* (1976) 18 Cal.3d 796, 800, which holds that when a prior conviction constitutes an element of a crime, the same conviction cannot also be used to increase the minimum sentence for the crime. *Edwards* involved the enhancement of a sentence for an ex-felon in possession of a firearm based on the same prior conviction that satisfied the ex-felon element of the substantive offense.

In addressing the interplay between sections 4500 and 667, subdivision (a)(1), we begin by observing that *Edwards* was decided under the former indeterminate sentencing law. (*People v. Baird* (1995) 12 Cal.4th 126, 128.) *Edwards* also precedes section 667, which was added to the Penal Code by Proposition 8 in June of 1982. (See *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1210.) Thus, the applicability of *Edwards* to section 667 has been questioned by many appellate court decisions, including this court. (See, e.g., *People v. Price* (1992) 4 Cal.App.4th 1272, 1278; *People v. Nobleton* (1995) 38 Cal.App.4th 76, 82; *People v. Sipe* (1995) 36 Cal.App.4th 468, 484-489; *People v. Bruno* (1987) 191 Cal.App.3d 1102, 1106-1107; *People v. Gaines* (1980) 112 Cal.App.3d 508, 516; *People v. Hurley* (1983) 144 Cal.App.3d 706, 711-713.) Further, the California Supreme Court has acknowledged the fact that appellate courts have questioned the viability of the *Edwards* rule, although it has not resolved the issue. (*People v. Baird, supra,* 12 Cal.4th at p. 131.)

In our analysis, we look to the plain language of section 667, subdivision (a)(1), which permits an additional consecutive five-year sentence to be imposed in addition to the current sentence. We are also mindful that the purpose of section 667 is to punish and impose greater sentences on recidivists. (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1518.)

In *People v. Yarborough* (1998) 65 Cal.App.4th 1417, 1420, we held "[t]he *Edwards* rule only applies to cases in which the new offense is not inherently criminal." In *Yarborough*, the defendant pled guilty for failing to register as a sex offender for a child molestation conviction. He also admitted that his prior child molestation conviction

constituted a prior serious felony within the meaning of the Three Strikes law. The defendant was sentenced to a 16-month mitigated term, doubled under the Three Strikes law. (*People v. Yarborough*, *supra,* 65 Cal.App.4th at p. 1419.)

On appeal, the defendant claimed the trial court violated *Edwards* by using his prior conviction as both a substantive element of the offense of failing to register as a sex offender and to increase his sentence under the Three Strikes law. (*People v. Yarborough*, *supra,* 65 Cal.App.4th at p. 1419.) We disagreed, finding *Edwards* distinguishable:

> "In *Edwards*, the underlying 'indispensable prior conviction' was for the sale of marijuana. Because of this conviction, Edwards was an ex-felon who could not possess a firearm. Possession of a firearm is not, by itself, criminal conduct. Usually, it is perfectly legal for citizens to simply possess firearms. Possession of a firearm is illegal, however, when it is done by an ex-felon. *Edwards* announced the limited rule that when the underlying prior conviction constitutes an element '*of criminal conduct which otherwise would be noncriminal*,' the sentence may not be enhanced because of the underlying conviction. (*People v. Edwards, supra,* 18 Cal.3d at p. 800, italics added.)
>
> "Here, in contrast to *Edwards*, the underlying felony offense is for an *omission* of required conduct by a convicted sex offender. It does not involve an *act*, at all, let alone an act that is otherwise legal. Yarborough's failure to register as a sex offender … is inherently criminal, unlike the mere possession of a firearm. The *Edwards* rule only applies to cases in which the new offense is not inherently criminal. This is not such a case. (*People v. Yarborough, supra,* 65 Cal.App.4th at p. 1420.)

Based on the reasoning of *Yarborough*, we conclude the *Edwards* rule does not apply in appellant's case. His new offense was for assault with a deadly weapon with malice aforethought, an act which is always criminal.

In addition, although *People v. Baird, supra,* 12 Cal.4th 126 did not involve section 667, subdivision (a), it did analyze the interplay between section 667.5, subdivision (b), and section 12021. Section 667.5, subdivision (b), provides for a one-year enhancement for each prior separate prison term served for any felony. The

defendant in *Baird* was convicted of being an ex-felon in possession of a firearm. His prior burglary conviction was used as both an element of the offense (being an ex-felon) and to impose a one-year enhancement under section 667.5, subdivision (b). (*People v. Baird, supra,* 12 Cal.4th at p. 129.)

Baird rejected the defendant's challenge that in his case the one-year enhancement violated the *Edwards* dual-use rule. It found the *Edwards* rule was not impinged upon where, as in *Baird*, the fact the defendant had served a prior prison term was not integral to the element of having suffered a prior felony conviction. "The distinction between a prior felony conviction and a separate prison term served for such felony is obvious." (*People v. Baird, supra,* 12 Cal.4th at p. 132.) Here, the fact that appellant committed a previous serious felony (as required in section 667, subd. (a)) was not integral to the element of being an inmate serving a life sentence under section 4500.

Finally, appellant's reliance on *People v. Jones* (1993) 5 Cal.4th 1142 is misplaced. *Jones* does not hold that a prior serious felony conviction cannot be used as both an enhancement under section 667, subdivision (a), and to establish an element of the crime. Rather, *Jones* held that when two statutory enhancement provisions are available for the same prior offense (i.e., section 667.5, subd. (b), prior prison term enhancement, and section 667, subd. (a), serious felony enhancement) only the one with the greater term will apply. (*People v. Jones*, *supra,* 5 Cal.4th at p. 1150.) *Jones* emphasized that all prior convictions warranting enhancements under section 667 would entail a prior prison term.

> "If a prior felony is 'violent' enough to qualify for an enhancement under section 667.5, it will a fortiori be noxious enough to qualify as 'serious' under subdivision (a) of section 667, and will almost always have resulted in a prison term." (*People v. Jones*, *supra,* 5 Cal.4th at p. 1150.)

As a result, *Jones* does not limit to certain classes of criminals the applicability of the sentencing enhancements found in sections 667 and 667.5 but, rather, limits the number

of enhancements that can be imposed on a defendant for the same prior conviction. (*People v. Jones, supra*, at p. 1150.)

Here, the imposition of the five-year serious-felony enhancement for a violation of section 4500 was proper and we reject appellant's claim to the contrary.

B. Use of prior conviction as an element of section 4500 and as a strike

Appellant also contends his prior life sentence conviction should not be used to prove an element of section 4500 and to enhance his sentence as a strike pursuant to section 667, subdivision (e). An enhancement is an additional term of imprisonment added to the base term. (*People v. Hernandez* (1988) 46 Cal.3d 194, 207.) Section 667, subdivision (e), provides for an alternate sentencing scheme where the defendant has a prior serious or violent felony conviction. It is not an enhancement. (*People v. Nobleton, supra,* 38 Cal.App.4th at p. 81; *People v. Sipe, supra,* 36 Cal.App.4th at p. 485; see also *People v. Garcia* (2001) 25 Cal.4th 744, 757.)

In *People v. Garcia, supra,* the defendant claimed his prior strike conviction could not be used as both an element of the crime and to double his sentence under the Three Strikes law. (*People v. Garcia*, *supra,* 25 Cal.4th at p. 756.) The *Garcia* court rejected the argument, stating that the plain and unambiguous language of the Three Strikes law disclosed an intent "to impose the enhanced, doubled sentence despite a possible 'dual use' of defendant's prior conviction." (*Id.* at p. 757.)

Section 667, subdivision (f)(1), provides that, "'[n]otwithstanding any other law, [the Three Strikes law] shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d).' This absolute language permits only the interpretation that the Legislature intended more severe punishment for recidivist felons, regardless of whether a prior conviction is a component of their current felony." (*People v. Sipe, supra,* 36 Cal.App.4th at p. 489.) As stated in *People v. Tillman* (1999) 73 Cal.App.4th 771, "These provisions demonstrate a broad intent to have the Three Strikes law apply to all recidivists coming within its terms. This intent would be frustrated by

allowing the *Edwards* rule to limit the prior convictions that could be used to trigger application of the Three Strikes law." (*Id.* at p. 782.)

We reject appellant's argument to the contrary.

VII. Tripling of appellant's sentence

Finally, appellant contends the court erred in imposing a sentence of 27 years to life, which is triple the nine-year minimum term prescribed by section 4500, instead of imposing a third-strike sentence of 25 years to life. In his reply brief, appellant concedes our Supreme Court's holding in *People v. Acosta* (2002) 29 Cal.4th 105, 112-118, to the contrary. We do not address this issue further.

DISPOSITION

One of the section 667, subdivision (a)(1), five-year enhancements is ordered stricken. The trial court shall prepare an amended abstract of judgment and forward it to the appropriate authorities. In all other respects, the judgment is affirmed.

_____
Wiseman, J.

WE CONCUR:

_____
Buckley, Acting P.J.

_____
Levy, J.